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No. 93-426

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

Opposition To Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of this Court, MGW, Inc. does not have any parent companies or non-wholly owned subsidiaries.

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I. INTRODUCTION.

This lawsuit is a month shy of its tenth birthday. Petitioners want to ensure that it reaches its teenage years. They urge this Court to start the California appellate process all over again. Petitioners do not even believe that the case is worthy of review by this Court; instead, they seek only a remand for yet a third journey through the California appellate system. They advise this Court that it must send a message to the California Supreme Court that due process attacks on punitive awards are not dead; but courts are not in the business of sending messages, but of deciding cases.

Petitioners give the merits of *this case* short shrift, no doubt because even they know the *merits* of this case are unworthy of review by this Court. This case was tried to a jury that found, by clear and convincing evidence, that petitioners had committed fraud and malice. They found that awards totalling 2.6 times the gain obtained by petitioners would be a fair amount to punish and deter. The highest award, $800,000, was only slightly greater than the $773,200 in actual damages. The jury was instructed, *at petitioners' insistence*, that they could consider wealth. This instruction is now petitioners' main complaint.

Two of the petitioners, Dunn and Fredricks, did not even bother to ask the trial judge to reduce the awards, and thereby waived the right to attack them as excessive. The California Court of Appeal *independently* examined the record and concluded that the award against Pacific Lighting was justified. At this point, *twelve jurors* and *three appellate court judges* have *independently* concluded that petitioners' conduct was "reprehensible", and the amounts awarded were proper. In fact, their main complaint is that the instruction that *they, not MGW,* proposed, told the jury that they could consider wealth in assessing punitive damages.

What is worse, petitioners fail to discuss the procedural problems with this case at all. For example, they act as though the California Supreme Court's dismissal of this case came out of the blue after this Court's decision in *TXO* came down. Ignored is the fact that a motion to dismiss for failure to preserve issues was pending before the California Supreme Court and had been fully argued, with the last briefs submitted only days prior to the dismissal.[1] They also ignore that the Court of Appeal had earlier found against them because of many of the same procedural shortcomings.

The California courts have *already* correctly decided this case in light of *Haslip* and *TXO*. There is no reason for this Court to order them to do it again.

II. SUMMARY OF PROCEEDINGS.

This case was tried to a jury which rendered a verdict in favor of MGW, Inc., against petitioners Dunn Properties Corporation, Fredricks Development Corporation, and Pacific Lighting. The jury awarded actual damages of $773,200 (inclusive of pre-trial interest) and punitive damages of $800,000 each against Dunn and Pacific Lighting, and $400,000 against Fredricks.

On motion for a new trial and judgment notwithstanding the verdict, the award against Pacific Lighting was vacated on grounds no longer relevant. The awards against Dunn and Fredricks were not disturbed.

The Court of Appeal affirmed as to Dunn and Fredricks, and reinstated the judgment against Pacific Lighting. The California Supreme Court declined to review that opinion. The

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[1] Issues of California law, as well as federal issues, were before the Court. Dismissal of these state law issues can only be explained on procedural grounds, since *TXO*, obviously, in no way controls them.

defendants then petitioned for *certiorari* on the punitive damage award only. This Court held this and other punitive damage cases pending its ruling in *Pacific Mut. Life Ins. Co. v. Haslip*. After affirming *Haslip*[2], this Court remanded all of those cases (except for two that arose in Alabama) back to the states for further proceedings in light of *Haslip*.

On remand, petitioners requested, and were granted, further briefing and oral argument. Ultimately, the Court of Appeal rejected the Federal Due Process challenge and reinstated its prior judgment. In so doing, it applied factors very similar to the *Green Oil* factors approved by this Court in *Haslip*, noting in particular that "in terms of reprehensibility, this is not a close case." pp. 30–1.

The Court of Appeal also found that California's standard of *trial court* review was "virtually independent"[3] and met any requirement of *Haslip*. The Court went on to hold that something less than independent *appellate* review was the standard in California, but found this constitutionally sufficient. Nonetheless, Pacific Lighting was accorded the same "virtually

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[2] *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1.

[3] The Court stated:

> Even so, in California the trial court's determination is virtually independent. "In considering a motion for new trial, the trial judge is entitled to reweigh the evidence, consider the credibility of the witnesses and draw reasonable inferences contrary to those accepted by the jury. [Citation.] The question is not whether there is substantial evidence to support the jury's verdict but whether the record supports the trial court's determination, after weighing the evidence, the jury should have reached a different verdict. [Citation.]" p. 24a–25a of Appendix of Petitioners.

independent" review afforded by the trial judge. Many of the claimed violations of due process were dismissed since they were not properly preserved. Specifically, Dunn and Fredricks' excessiveness claim was rejected since not made in the trial court.[4] The Court undertook a comparison of this award to awards in other cases in light of the factors underlying the imposition of punitive damages.[5] The Court concluded that there was nothing excessive about the award.[6]

The California Supreme Court then granted review. Petitioners sought to present the same argument concerning wealth as they ask this Court to consider.[7] While review was pending, this Court granted *certiorari* in *TXO Production Corp. v. Alliance Resources Corp.* (1992) 419 S.E.2d 870, and the California Supreme Court stayed further briefing pending

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[4] "We presume that had Fredricks and Dunn asked the trial court to review whether the damages were *excessive*, the court would have done so." p. 23a of the Appendix of Petitioners.

"As we have noted, Fredricks and Dunn received as much review as they requested: whether *any* punitive damages were merited." p. 25a of the Appendix of Petitioners.

[5] "Although not necessarily constitutionally mandated, a comparison of punitive to compensatory damages ratios and percentages of net worth helps ensure an award is reasonable within the context of all awards." p. 26a of Appendix of Petitioners.

[6] "Here, the ratio was 3.4 to 1 ($2 million to $588,000), below the 4 to 1 ratio the *Haslip* court found *might* be 'close to the line.'" p. 28a of Appendix of Petitioners. "The ratio drops to 2.6 to 1 if pretrial interest is included in the compensatory damages amount ($2 million to $773,200)." *Id.* at fn. 16.

[7] In the case of Dunn and Fredricks, this was a total flip-flop. Previously, they had argued that the judgment against them should be reversed since there was no evidence of their wealth.

resolution of that case. App. 35a of Appendix of Petitioners. MGW moved the Court to dismiss the appeal as improvidently granted for various procedural deficiencies that would preclude relief even apart from the substantive due process contentions.[8] As the first item on the motion, MGW asserted dismissal was warranted because, "1. Defendants proposed the punitive damage instruction which they now condemn."

After the Court took the motion under submission, but before decision, this Court's opinion in *TXO*[9] was filed. The parties then filed additional briefs on the motion to dismiss, discussing the effect of this Court's *TXO* decision at length. MGW pointed out that this Court's decision in *TXO* provided additional support for its position. Petitioners filed opposition, controverting MGW's position, and discussing *TXO* in detail.[10]

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[8] A copy of the motion is attached to the Appendix to this brief.

[9] *TXO Production Corp. v. Alliance Resources Corp.* (1993) ___ U.S. ___., 113 S.Ct. 2711.

[10] Pacific Lighting, nine days before the California Supreme Court dismissed review, filed a brief which discussed in detail *TXO* and argued that this case should not be dismissed:

> MGW asserts in its supplemental brief in support of its motion to dismiss that the United States Supreme Court's June 25, 1993 decision in *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479 (copy attached), "disposes" of these issues. That assertion is flatly incorrect, and MGW's motion to dismiss should be denied...Nothing in *TXO* obviates the pressing need for this Court to resolve that exceedingly important question. Moreover, MGW's "waiver" argument in support of dismissal is utterly without merit... *Pacific Lighting Corporation's Response to MGW, Inc.' Supplemental Brief in Support of Motion to Dismiss as Improvidently*

The California Supreme Court then unanimously granted the motion. The instant petition for *certiorari* was then filed.

III. STATEMENT OF FACTS.

The underlying facts of this case are discussed at length in the Court of Appeal opinion and need not be repeated here given the issues under review. In essence, Fredricks agreed to pay MGW a finder's fee if MGW found it an investment opportunity.[11] MGW brought the Rancho Carmel project to Fredricks' attention, and Fredricks, along with Dunn, a related corporation, entered into a joint venture with Home Capital on the property. Dunn and Pacific Lighting induced Fredricks to renege on paying MGW a finder's fee by concocting a story to the effect that they had not learned of the Rancho Carmel

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Granted, pp. 1, 8.

[11] Petitioners' side-argument that the award is excessive because MGW should not recover for entering into an unenforceable oral commission agreement is really nothing more than an attack on the settled law of California in this regard. *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, and its progeny establish that it is the policy of California to discourage persons from committing interference, whether or not the relationship had ripened into a binding contract. In fact, this represents the majority rule:

> A promise may be a valid and subsisting contract even though it is voidable... Thus, *by reason of the statute of frauds*, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, the third person may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided. Restatement of Torts, Second, Section 766, comment f.

opportunity through MGW, when they clearly had. Dunn, Fredricks, and Pacific Lighting operated through their senior management, including the presidents of Dunn and Fredricks. Their story, had it been successful, would have saved them over half a million dollars. As the Court of Appeal noted, their conduct throughout was fraudulent and in bad faith.

IV. PETITIONERS' "SEND A MESSAGE" ARGUMENT IS UNSOUND.

A. Since the California Supreme Court has already considered *TXO*, remand for further consideration in light of *TXO* makes no sense.

The first reason petitioners assert for remanding this case is that the California Supreme Court misperceived this Court's intent when it decided *TXO*. In their view, this Court, by its affirmance of the award in *Haslip*, gave strict marching orders to the state courts to get their houses in order. Despite this, their argument continues, both the California Court of Appeal and Supreme Court do not seem to have gotten the message. This Court must, by remanding here, impress upon those courts that they have mistakenly construed *Haslip* and *TXO*.

The trouble with this reasoning is that the California courts have already decided this case the way they have because, *having considered Haslip* and *TXO*, they felt the result here was correct. It is simply speculation that the California Supreme Court misconstrued *TXO*. Petitioners have no right to a remand on the bald assertion that the California courts misunderstood this Court's intent. (If this Court were to remand, and the California courts again affirmed the awards, would yet another remand be in order?) And totally ignored in this discussion is the central issue here, whether *this* case was wrongly decided. On this point, petitioners have virtually nothing to say.

B. The Court of Appeal opinion already fulfills any requirements that *TXO* might impose.

The Court of Appeal analyzed the facts of this case in the same fashion as did the plurality in *TXO*:

TXO	*MGW*
The punitive damages in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so "grossly excessive" as to be beyond the power of the State to allow.	...the jury agreed with MGW's theory of the case and found that this was more than a simple misunderstanding or breach of contract...MGW's theory was that the defendants decided to falsely claim that Dunn had previously known about the Rancho Carmel property so that MGW would not be entitled to its finder's fee. The fraud was all the worse because it was the product of a conspiracy....*In terms of reprehensibility, this is not a close case....* The punitive damages ratio here falls well within that approved in numerous California cases.

These findings meet the requirements of *TXO*. Just one factor, the need to take the profit out of petitioners' wrongful conduct, provides ample support for the sums awarded. If the worst that can happen to a thief is that he has to give the stolen goods back, then thievery makes good economic sense.

Compensatory damages in this case did nothing except force petitioners to disgorge their ill-gotten gains. If that is their downside risk, then they have a green light to repeat the same conduct. Is it really more likely that the jury here was bent on redistributing wealth than on inflicting a penalty on petitioners (2.6 times the ill-gotten gains) sufficient to keep them from doing it again?

C. Denials of *certiorari* by this Court indicate that no "misperception" has occurred.

While making much over this Court's remand of *Hanson v. American Nat'l Trust Co.* (1993) 113 S.Ct. 3029, in the closing days of last term, petitioners ignore the uniform denial of *certiorari* in punitive damage cases.[12] Of particular note is the denial in *Shell Oil Co. v. Nelson*, docket no. 93-84, a California case.

V. THE "WEALTH INSTRUCTION" DOES NOT SUPPORT REMAND.

The second reason petitioners cite as requiring remand is that, in their view, this case squarely presents the issue of the wealth instruction that the *TXO* plurality refused to reach. Petitioners ignore that:

-- *they, not MGW,* requested the instruction telling the jury to consider wealth;

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[12] *Reserve Nat. Ins.' .Co. v. Crowell*, docket no. 92-1978, *Hillcrest Mecial Center v. Scribner*, docket no. 92-1982, *Swarovski Int'l. v. Ebeling & Reuss*, docket no. 92-2041, *Shell Oil Co. v. Nelson*, docket no. 93-84, *Owens-Illinois, Inc. v. Pool*, docket no. 92-1241, *Nickerson American Plant Breeders, Inc. v. Latham Seed Co.*, docket no. 92-1376, *Celotex Corporation v. Pool*, docket no. 92-1471, *Farmers Ins. Group v. Massey*, docket no. 92-1570, *National States Ins. Co. v. Nassen*, docket no. 92-1378.

-- Dunn and Fredricks successfully kept out evidence of their financial condition, only to then later argue that wealth was a necessary prerequisite for an award of punitive damages;[13]

-- the award, amounting to 2.6 times actual damages, does not reflect a runaway jury enraptured by how rich the defendants were;

-- the aggravating factors that made *TXO* at all a close case are absent here;[14]

-- California procedure afforded petitioners the right to bifurcate the issue of punitive damages, with evidence of wealth not allowed in the first, non-punitive, phase;[15]

-- the jury awarded the same amount, $800,000, against Pacific Lighting, by far the wealthiest of the defendants, as it did against Dunn, awarded less, $400,000, against Fredricks, and nothing against a fourth co-conspirator, Pacific Real Estate Project, Inc. These awards belie that wealth was a controlling factor in determining the appropriate punishment.

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[13] See Opinion of the Court of Appeal, p. 30a of Appendix of Petitioners, n. 18. And in the California Supreme Court they argued "...there was no evidence in the record as to the wealth of Fredricks and Dunn". *Appellants' Opening Brief*, p. 19.

[14] There were no references to defendants being out of state (since they weren't) nor to their corporate identity (perhaps because plaintiff was a corporation as well, and the court instructed that the defendants' corporate capacity could not be taken into account).

[15] Civil Code Section 3295 requires bifurcation of the amount of punitive damages on the request of any defendant. Only after the jury finds the factual prerequisites for punitive damages does the defendant's wealth become an issue.

A. Failure to have objected in the trial court precludes consideration by this Court.

Petitioners contend that because the Court of Appeal considered their wealth argument, it is now properly before this Court. They ignore *City of Springfield, Mass. v. Kibbe* (1987) 480 U.S. 257. There, as here, the petitioner had requested the jury instruction. Nonetheless, the Court of Appeals had addressed the instruction. This Court, applying the doctrine of invited error, refused to do so:

> The Dissent argues that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals below. Dissent, at 1118–9. There is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so. [Citation.] We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested. *Id.* at 1116.[16]

Under California procedure, a party may not challenge a jury instruction that he proposed, even where it is contrary to law. *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117. *See also, Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81, 82; *Mercer v. Theriot* (1964) 377 U.S. 152, 154; *United States v. Atkinson* (1936) 297 U.S. 157, 159.

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[16] In fact, under the authority of *Kibbe*, the Seventh Circuit has rejected a challenge to a punitive damage instruction for failure to have objected at trial. *Williamson v. Handy Burron Mach. Co.* (7th Cir. 1987) 817 F.2d 1290, 1295. *See also, Mairena v. Foti* (5th Cir. 1987) 816 F.2d 1061, 1064, fn. 2.

These cases all recognize the fundamental injustice of allowing a party to obtain a reversal based upon an error made *at his request*.

B. There is no basis for reconsideration.

Petitioners seek a remand to the Court of Appeal for "reconsideration" of its ruling that the wealth instruction was constitutional in light of *TXO*. To the extent that *TXO* does shed light on this issue, the California courts' analysis of this case is consistent with that light. Three justices in dissent in *TXO* expressly found wealth an appropriate consideration:

> This is not to say that consideration of a defendant's wealth is unconstitutional.... As a historical matter, the wealth of the perpetrator long has been thought relevant....Moreover, Haslip itself suggests that the defendant's wealth is a permissible consideration, ante, at 17–18, n. 28, 19 (plurality opinion), although it does so only in the context of appellate review. See, 499 U.S., at 22. (O'Connor, dissenting)

While this quotation is from the dissent, combined with the views of Justices Scalia and Thomas, there are *at least* five[17] justices who view wealth as an appropriate consideration. [18] [19] Nor is there anything in Justice

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[17] *See also, Browning-Ferris Industries v. Kelco* (1989) 492 U.S. 257, 109 S.Ct. 2909, O'Connor, dissenting. In that case, Justice Stevens joined with Justice O'Connor in finding wealth an appropriate consideration, indicating that at least six justices believe wealth an appropriate consideration.

[18] The Court has also recognized on previous occasions that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded", *City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 270,

Kennedy's concurrence that indicates wealth may not be considered.[20] The plurality decision in *TXO* did not decide

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[noting that the *Restatement* rule allows such evidence]. The *Restatement of Torts, Second*, Section 908(2) states: "The trier of fact can properly consider...the wealth of the defendant."

[19] That is not to say that, in a particular case, the over-emphasis placed upon wealth could not create an arguable issue. But the instruction here, which informed the jury that wealth is a relevant consideration, is not therefore constitutionally suspect. If a jury is entitled to take wealth into account (as it is), the issue is: Has the jury followed its instructions (taking wealth into account only as a factor to determine the appropriate level of punishment), or has it instead acted based on a prejudice against a wealthy defendant or a desire to redistribute wealth? That some juries do not follow instructions is not a reason to throw out the baby with the bath water.

[20] In Justice Kennedy's view, the proper inquiry is whether the record demonstrates that the jury acted out of improper motives such as bias or prejudice. In *TXO*, in his view, the record showed that the jury was motivated by the malice of TXO rather than inappropriate preoccupation with its wealth:

> There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or *respondeat superior*. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent."

anything at all concerning the wealth instruction, specifically refusing to reach the issue. Thus, if this Court remanded the case for reconsideration "in light of *TXO*", the obvious next question is, In light of what? In light of the plurality's refusal to reach the issue? There is simply no reason to remand this case "in light of TXO".

C. Other California procedures assured that the defendants' due process rights were protected.

Examining California procedures at the three stages analyzed in *Haslip* confirms that petitioners' interests were protected far beyond what due process requires:

Jury Instruction.

The California jury is told specific factors to apply, similar to the *Green Oil* factors that Alabama applies on review; by contrast, the jury in *Haslip* was told simply to punish and deter.

The California defendant, unlike Pacific Mutual, enjoys a "clear and convincing" standard.[21]

[Citation.] (Kennedy, J., concurring)

The same considerations apply here. The conduct of the defendants was found by the Court of Appeal to be "reprehensible". As in *TXO*, the conduct here was not of some renegade low-level employees, but of corporate officers of the highest rank. In fact, under California law, only the conduct of high ranking corporate employees can form the basis for a punitive award. Civil Code Section 3294(b).

[21] In addition, under California law, a defendant can be punished only for a wrong he has committed or approved, Civil Code Section 3294(b); an innocent Alabama defendant can be punished for what his employees did.

Unlike California, the jury in Alabama is not told to segregate the amount of punitive damages; in California, they must be segregated.

In addition, in California, the defendant is entitled upon request to a bifurcated trial, with evidence of his finances kept from the jury until it has first found the requisite facts to award punitive damages. Civil Code section 3295(d).[22]

Post-trial Review.

Petitioners Dunn and Fredricks did not request that the trial judge determine whether the award against them was excessive, apparently because they did not believe they had a prayer of winning on the issue. The Court of Appeal held that this failure constituted a waiver. The Court of Appeal also noted that, in light of comments of the trial judge on other issues, he would not have been inclined to reduce the award had he been asked to do so.

Since Pacific Lighting obtained judgment notwithstanding the verdict, the trial judge did not pass on the excessiveness of the award as to it. By the time the Court of Appeals reinstated the verdict against Pacific Lighting, the trial judge had died. Therefore, the appellate court, as is authorized under California law, conducted the review of the award normally undertaken by the trial judge. In so doing, it applied the normal California post-trial standard, which it termed as "virtually independent".[23] It concluded that, in its independent

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[22] In this case, the trial was not bifurcated since defendants, for reasons known only to themselves, did not request bifurcation.

[23] The Court relied upon *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 933, which states that the trial judge sits as an "independent trier of fact" and is authorized to reduce the punitive damage award by "so much [of the verdict] as the court *in its independent judgment determines from the evidence to be fair and*

judgment, the verdict against petitioners should stand.

Appellate Review.

Even assuming that appellate review is required, a dubious assumption at best[24], nothing approaching "independent" appellate review is required. The jury award in *Haslip* was, after all, "presumed correct" by both the Alabama

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reasonable." [Emphasis in original.] Because in *Neal* the evidence on the point was "*in substantial conflict*", *id.* [emphasis added], the Court *upheld the trial judge's remittitur*.

[24] Due process does not require appellate review at all. *Evitts v. Lucey* (1985) 469 U.S. 387, 393; *Ross v. Moffitt* (1974) 417 U.S. 600, 606; *Griffin v. People of the State of Illinois* (1956) 351 U.S. 12, 18, *Dist. of Columbia v. Clawans* (1937) 300 U.S. 617, 627; *Reetz v. Michigan* (1903) 188 U.S. 505, 508; *McKane v. Durston* (1894) 153 U.S. 684, 687. True, the protections available through appellate review may save an otherwise defective system. But an otherwise adequate system does not become defective even if there is no right to appeal at all. *See, e.g., Ohio v. Akron Park District* (1930) 281 U.S. 74, 80 ["the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance."]

trial judge and the Alabama Supreme Court.[25]

VI. THE PROCEDURAL DEFECTS IN THIS CASE PRECLUDE RELIEF.

Petitioners are required to preserve issues that they wish to appeal. The California Court of Appeal and Supreme Court both found that petitioners failed to do so. These defects prevent review here since they constitute adequate and independent state procedural grounds.

In this case,

1. Defendants proposed the punitive damage instruction which they now condemn. RT 1639/3–18.

2. At no time was a federal issue raised by *anybody* at trial.

3. Defendants did not request that the trial judge reduce the punitive damage award.

4. Defendants Dunn and Fredricks never raised a federal issue on the first appeal.

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[25] In fact, the California *appellate standard* is virtually identical with the Alabama *trial judge standard*:

Hammond (Alabama)

We do emphasize, however, that only where the record establishes that the award is excessive or inadequate as a matter of law, or where it is established and reflected in the record that the verdict is based upon bias, passion, corruption or other improper motive may a *trial court* order a new trial or remittitur. Id. at 1379. [Emphasis added.]

Neal (California)

[W]e indicated that an appellate court may reverse such an award "only `when the award as a matter of law appears excessive, *or* where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.' *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 927.

5. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel on appeal) advanced a due process argument, albeit a different one than it advances now.[26] This argument was rejected summarily.

6. On appeal, none of the defendants sought reduction of the punitive damage award.

7. In their prior petitions for review, none of the defendants sought reduction of the punitive damage award.

8. In their prior petitions for *certiorari*, none of the defendants sought reduction of the punitive damage award.

VII. CONCLUSION.

The efforts of ten years, twelve jurors, and three justices of the California Court of Appeal (on two occasions) have gone into this case. The decision is unanimous: petitioners' senior management conspired to defraud MGW out of over half a million dollars.

After all this time, the best petitioners can do is argue that the trial judge erred when he went along with their proposed jury instruction. While they may argue that this was error, they cannot argue that it was not invited.

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[26] It argued that the California scheme for assessment of punitive damages violates due process *because it does not set a ceiling* in advance on the amount of punitive damages that can be assessed.

Petitioners have had enough process. A third trip through the California appellate system is uncalled for. *Certiorari* should be denied.

October 14, 1993.

Respectfully submitted,
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APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FOURTH CIVIL NO. G006654
SUPREME COURT NO. S015966

MGW, INC.,
A California Corporation,
dba THE WAITT COMPANY,
Plaintiff and Respondent,
vs.
FREDRICKS DEVELOPMENT CORPORATION, et al.
Defendants and Petitioners.

Appeal From the Superior Court Of Orange County
Honorable Samuel B. Taylor
Superior Court Case No. 416196

MOTION TO DISMISS APPEAL AS
IMPROVIDENTLY GRANTED

The Court has ordered briefing in this case stayed pending the decision of the United States Supreme Court in TXO Production Corp. v. Alliance Resources Corp., Docket No. 92-479, *certiorari granted* November 30, 1992. While that case may or may not have anything to say that sheds light on the Due Process issues in this case, it certainly will have nothing to say concerning the California state law *procedural* reasons why this appeal must fail. In short, in this case,

1. Defendants proposed the punitive damage instruction which they now condemn.

2. At no time was a federal issue raised by *anybody* at trial.

3. Nor did defendants request that the trial judge reduce the punitive damage award.

4. Defendants Dunn and Fredricks never raised a federal issue on the first appeal.

5. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel on appeal) advanced a due process argument, albeit a different one than it advances now.[1] This argument was rejected summarily.

6. On appeal, none of the defendants sought reduction of the punitive damage award.

---

[1] It argued that the California scheme for assessment of punitive damages violates due process *because it does not set a ceiling* in advance on the amount of punitive damages that can be assessed.

7. In their prior petitions for review, none of the defendants sought reduction of the punitive damage award.

8. In their petitions for *certiorari*, none of the defendants sought reduction of the punitive damage award.

9. On remand from the U. S. Supreme Court, for the first time, petitioners argued that the award was excessive on federal, not state, grounds.

The procedural issues which bar relief have been fully briefed by the parties here and in the court below. Any additional argument on the point that appellants may wish to make can be made in reply to this motion. No useful purpose is served by a long wait for the TXO decision if, in fact, the case must be affirmed in any event for procedural reasons.

Accordingly, MGW respectfully requests that the Court consider those issues at this time and dismiss the appeal as improvidently granted.

Dated: March 1, 1993

Respectfully submitted,
PEREZ & McNABB
by JEFFREY ALAN MILLER
Attorneys For Plaintiff/Respondent.